IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, v. ROBERT DAVID CHEELEY, ET AL., Defendants.	Case No. 23SC188947

DEFENDANT ROBERT DAVID CHEELEY'S
REPLY IN SUPPORT OF SUPPLEMENTAL BRIEFING

"If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). Here if the State wants to ***jail*** a citizen (presumed innocent), then it must have its Indictment in order, plead all elements of the crimes alleged, plead facts sufficient to put the citizen on notice of the alleged transgressions, and do so in a way that comports with the U.S. and Georgia Constitutions. In response to Defendants showing the Indictment does none of this, the State continues to say its Indictment is "good enough." It is not. This reply addresses the deficiencies in the State's December 18, 2023, Post-Hearing Brief.

1. The First Amendment Bars the Charges Against Cheeley

The State has not shown where the Indictment charges Cheeley for anything other than his political speech related to the 2020 presidential election. The statutes at issue are subject to strict scrutiny because each is aimed at criminalizing Cheeley's political speech based on its content and viewpoint. *See U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803,

813 (2000). Under this analysis, no court has ever allowed a similar prosecution to proceed. The State ignores the previously cited 45+ (mostly U.S. Supreme Court) cases supporting Cheeley's position. And it avoids explaining how its prosecution or any of the statutes underlying the Indictment survive strict scrutiny. The State merely presents two weak arguments in response to Cheeley's constitutional concerns. These are dispatched below.

First, the State says it is not the appropriate time to review the Indictment's constitutional failings. But *Hall*, *Santos*, *Perkins*, *Randolph*, *Baker*, *and Horowitz* say otherwise. All stand for the proposition that the Court must review as-applied and facial constitutional challenges to an indictment based upon the ***State's own*** pleadings and averments—especially regarding free speech challenges.

Second, the State makes the circular argument that any protected speech concerns Cheeley raises are irrelevant because his speech is ancillary to the crimes charged. This argument fails out of the gate because: (1) the 45+ cases cited by Cheeley (including those addressing the attempted criminalization of political speech) say otherwise; and (2) the Indictment fails to explain how any of Cheeley's speech is anything other than oral and written speech related to the 2020 presidential election. Cheeley is charged only with "crimes" arising from his exercise of his free speech. This is precisely what the First Amendment protects against.

The few cases cited by the State underscore the weakness of its position. *United States v. Stevens*, 559 U.S. 460 (2010) dealt with a statute criminalizing dog fighting videos—which was held ***un***constitutional. *United States v Williams*, 553 U.S. 285 (2008), dealt with a revised statute criminalizing child pornography. *Williams* upheld the child-

pornography restriction, but only after noting it was a more narrowly tailored version of a statute the Supreme Court previously held did violate the First Amendment. *Rice v. Paladin Enterprises*, *Inc.*, 128 F.3d 233 (4th Cir. 1997), dealt with whether a how-to manual for contract killers that was utilized as part of a brutal family murder fell within the "abstract advocacy of lawlessness" protection of the First Amendment. Dog fighting, child pornography, and murder-for-hire cases are the best the State can muster.[1] But none of them involve speech in the political context, when the First Amendment is at its absolute apex. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). And a casual review of those cases shows the strength of First Amendment even in light of such concerning activities.[2]

Stevens does recognize that "permitted restrictions upon the content of speech in a few limited areas … including: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." 559 U.S. at 469.[3] None of these narrow exceptions is applicable here. And "integral to criminal conduct" does not mean what the State intimates.

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[1] The State simply pulls these citations from *United States v. Trump*, CR 23-257-TDC at pp. 31-32 (D.D.C. December 1, 2023). But that decision also does not deal with the caselaw and precedent cited by Cheeley or explain how *Stevens*, *Williams*, or *Rice* applies to the facts of that case.

[2] Even a threat to the president's life, if made in "political hyperbole," is protected free speech and does not fall within the statute criminalizing threats against the President. *See Watts v. U.S.*, 394 U.S. 705, 708 (1969). It is clear that otherwise punishable speech may receive additional protections in the political arena.

[3] In its Supplemental Brief the State adds to the list in *Stevens* "or lies that threaten to deceive or harm the government." That category is not listed in *Stevens.* The State tries to buck up its non-inclusion by citing *Haley v. State,* 289 Ga. 515 (2011)— which, like *Stevens* has nothing to do with political or election speech.

See Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016) *see also Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020).[4] The State is grasping at straws because it has nothing else.

2. The State Failed To Allege Solicitation of Oath of Office

In *Sanders v. State*, the Georgia Supreme Court recognized that in order to properly plead a O.C.G.A. § 16-4-7(a) solicitation claim, the State must plead the underlying elements of the crime along with sufficient facts to support the allegation. 313 Ga. 191, 202 (2022).[5] This in turn requires the State to plead sufficient facts to show what alleged underlying "crime" was being solicited and how. *Id.* Like in *Sanders* (where the indictment

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[4] "[T]he best understanding of the 'integral to illegal conduct' exception is this: (a) When speech tends to cause, attempts to cause or makes a threat to cause some illegal conduct (illegal conduct other than the prohibited speech itself)—such as murder, fights restraints of trade, child sexual abuse, discriminatory refusal to hire and the like . . . (b) But the scope of such restrictions must still be narrowly defined in order to protect speech that persuades or informs people who were not engaged in illegal conduct" Volokh, 101 CORNELL L. REV. at 986; *see also id*. at 1006 (citing *NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 903–04 (1982)); *id.* at 1049 (citing *Gehartv. State*, 360 P.3d 1194 (2015); *State v. Melchert-Dinkel*, 844 N.W. 2d 13, 19-20 (Minn. 2014). The Indictment's premise is that the Defendants "illegally" sought to overturn the 2020 presidential election. But the Indictment does not say how this was supposed to happen and who was supposed to do the overturning. The Indictment further does not say what laws the persons allegedly doing the overturning would violate. For instance, Cheeley gave testimony before a Georgia Senate Subcommittee on December 30, 2020, pointing out concerns regarding the vote counting at State Farm Arena. But the Indictment does not tie that speech to any criminal activity whatsoever. The Senate Subcommittee could do ***nothing***, and accordingly did ***nothing***, to change, let alone impermissibly change, the outcome of the presidential election ***at all***. And if the Georgia Senate Subcommittee could, or tried to, do so, what law would it have violated and how? The Indictment does not say. It simply punishes Cheeley for speaking. There is no call to arms or violence. There is no insurrection. There is no bribery. There is no preventing persons from voting. There is just speech.

[5] The State cites *Sanders* but neglects this controlling portion of the decision—and *Sanders*, along with the other cases cited by Defendants, answers this question.

only vaguely referred to the Controlled Substances Act violation being solicited), where this is not pled, the Indictment must be dismissed. *Id*. Here, the State claims certain Defendants solicited politicians to breach their oath of office in violation of O.C.G.A. § 16-10-1.[6] But the State does not plead which oath Defendants were soliciting to be violated—and that is the bare minimum required to put Defendants on notice of the allegations against them. The State's Post-Hearing Brief *still* does not say how any alleged oath was or could be violated, let alone what the oath was. And the Indictment certainly does not plead it.[7] Accordingly, the Indictment must be dismissed.

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This is an important case. In light of its importance, the State should have more carefully researched and pled its claims in the three years it had to do so. Had the Indictment been viewed objectively in light of controlling law it should never have been brought. But viewing it now in light of the pleadings and controlling law, it must be dismissed.

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[6] There are no Georgia cases dealing with the "solicitation" of "violation of the oath of office." The State's novel Indictment is the first.

[7] The State says Defendants must know what oath the State is talking about because at oral argument counsel for Defendant Ray Smith said there is only one oath that State legislators take. Ok. But is that the oath the Indictment meant? And if so**, *how*** was it to be violated? The Indictment provides absolutely no answers to these questions. And the State still leaves it a mystery.

Respectfully submitted, December 20, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 20th day of December 2023, served a true and correct copy of the foregoing DEFENDANT ROBERT DAVID CHEELEY'S REPLY IN SUPPORT OF SUPPLEMENTAL BRIEFING via electronic filing.

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